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In The

Supreme Court of the United States

October Term, 1977

No. 77-381

LAMONT ATKINSON,
Petitioner
v.
STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA AND THE NORTH CAROLINA
COURT OF APPEALS

BRIEF OF RESPONDENT,
STATE OF NORTH CAROLINA, IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the North Carolina Court of Appeals is reported at 33 N.C. App. 404, 235 S.E.2d 289 (1977). The judgement of the North Carolina Supreme Court dismissing the petitioner's appeal ex mero motu and denying his petition for discretionary review appears in 292 N.C. 730, 235 S.E.2d 784 (1977). A copy of the opinion of the North Carolina Court of Appeals and a copy of the North Carolina Supreme Court judgement are appended to the petition. (Pet. Br. A1-A6).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V.

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb . . .

AMENDMENT VI.

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

AMENDMENT XIV.

> Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

General Statutes of North Carolina:

N.C.G.S. 90-95

Violations; Penalties. - (a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell, or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
(2) To create, sell or deliver, or possess with intent to sell or deliver a counterfeit controlled substance;
(3) To possess a controlled substance.

QUESTIONS PRESENTED

1. WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS THE CONVICTIONS OF AND CONSECUTIVE SENTENCES IMPOSED UPON THE PETITIONER FOR THE OFFENSES OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL IN VIOLATION OF N.C.G.S. 90-95(a)(1) AND THE SALE OF A CONTROLLED SUBSTANCE IN VIOLATION OF N.C.G.S. 90-95(a)(1), WHEN THE CONVICTIONS WERE BASED UPON PROOF OF THE SAME TRANSACTION.
2. WHETHER THE ADMISSION OF TESTIMONY FROM A PROSECUTION WITNESS REGARDING HIS PRESENT RECOLLECTION REFRESHED OF THE DENOMINATIONS OF AND THE NUMBER OF BILLS ALLEGEDLY TRANSFERRED TO THE PETITIONER IN EXCHANGE FOR A QUANTITY OF HEROIN VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT ACCUSING WITNESSES AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

STATEMENT OF THE CASE

Petitioner is currently in the custody of the North Carolina Department of Correction, serving the first of two consecutive nine-year sentences pursuant to judgements entered on May 27, 1976, by the Superior Court of Wayne County, North Carolina.

Atkinson was arrested on October 21, 1975. On October 27, 1975, he was indicted by the Wayne County Grand Jury

in two separate bills of indictment. Count I of the first indictment alleged that on or about the 26th day of August, 1975, Lamont Atkinson did unlawfully, wilfully and feloniously possess with intent to sell and deliver a controlled substance (heroin) in violation of the North Carolina Controlled Substances Act. Count I of the second indictment alleged that on or about the 26th day of August, 1975, Lamont Atkinson did unlawfully, wilfully and feloniously sell and deliver to Special Agent Johnnie L. Price a controlled substance (heroin) in violation of the North Carolina Controlled Substances Act. Count II of each indictment alleged that Lamont Atkinson had two prior convictions of felonious possession of heroin.

Petitioner was tried before a jury in May, 1976 and convicted of the felonies of possession of a controlled substance (heroin) with intent to sell and deliver and the sale and delivery of a controlled substance (heroin) in violation of N.C.G.S. 90-95(a)(1). Petitioner was sentenced to serve two nine-year terms in the State Prison, the nine-year sentence for possession with intent to sell to run at the expiration of the nine-year sentence imposed for the sale.

The Petitioner appealed his convictions and sentences to the North Carolina Court of Appeals. In an opinion filed May 18, 1977 and certified June 7, 1977, the North Carolina Court of Appeals affirmed Petitioner's convictions. Thereupon, Petitioner filed a Notice of Appeal with the Supreme Court of North Carolina and in the alternative, filed with that Court a Petition for Discretionary Review. By order of the Court in conference dated June 17, 1977, the Supreme Court of North Carolina dismissed the appeal ex mero motu and denied the Petition for Discretionary Review. Two of the bases for relief set forth by the Petitioner in his brief for the North Carolina Court of Appeals, in his Notice of Appeal to the Supreme Court of North Carolina and in his Petition to the North Carolina Supreme Court for Discretionary Review are the same two issues raised in the petition to this Honorable Court.

At Petitioner's trial, the State presented evidence tending to show that on August 26, 1975, Johnnie L. Price, Special Agent with the Drug Enforcement Administration of the United States Treasury Department went to the Goldsboro apartment of the Petitioner and purchased heroin from the Petitioner for the sum of $6000. Agent Price testified that he received the $6000 used to make the purchase from his supervisor, Special Agent Donald Ashton, and that the $6000 was made up of 30 one hundred dollar bills, approximately 40 fifty dollar bills and approximately 40 twenty dollar bills.

In testifying regarding the numbers and denominations of the money used to make the buy, Agent Price was allowed to refer to a typewritten list. Agent Price testified that the list was prepared by his secretary under his supervision from the original lists of serial numbers recorded by himself and other officers on August 26, 1975. Agent Price testified that he had asked four other officers to help him record the serial numbers of the $6000 because of the time involved. Agent Price testified that while he did not double check the serial numbers written by the others, he did count the money after the lists were made and matched the amounts of money with the amounts written on each person's list. Agent Price further testified that he could use the list to refresh his recollection of the number and denominations of the bills making up the $6000.

At no point in the trial did Agent Price testify as to any of the serial numbers on the list. Nor was any use made of the list except to refresh Price's memory of the number and denominations of the bills allegedly given to the Petitioner in exchange for the heroin.

ARGUMENT

1. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT DOES NOT BAR THE CONVICTIONS OF AND CUMULATIVE

SENTENCES IMPOSED UPON THE PETITIONER FOR THE OFFENSES OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL AND THE SALE OF A CONTROLLED SUBSTANCE IN VIOLATION OF N.C.G.S. 90-95(a)(1) WHEN THE CONVICTIONS WERE BASED UPON PROOF OF THE SAME TRANSACTION.

The Double Jeopardy Clause protects against multiple punishments for the same offense. NORTH CAROLINA v. PEARCE, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). When the same transaction constitutes a violation of two distinct statutory provisions, the applicable test for determining "whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." BLOCKBURGER v. UNITED STATES, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

The Supreme Court of North Carolina has held that the possession and the sale of a controlled substance are separate and distinct offenses and that one charged with both offenses may be convicted of both and sentenced to imprisonment for each. See STATE v. AIKEN, 286 N.C. 202, 209 S.E.2d 763 (1974); STATE v. THORNTON, 283 N.C. 513, 196 S.E.2d 701 (1973); STATE v. CAMERON, 283 N.C. 191, 195 S.E.2d 481 (1973). The Court in STATE v. CAMERON, supra, held these to be separate offenses because it found that under North Carolina law one may legally possess a controlled substance and still be convicted of the unlawful sale of that same controlled substance. Thus, under North Carolina law, an unlawful sale would not prove illegal possession. The *Cameron* Court also found that since the unlawful sale requires a specific act, proof of a sale involves an additional fact not required for possession. In reaffirming its decision in CAMERON, the Supreme Court in STATE v. AIKEN, supra at 206, stated

as follows:

> "As we pointed out in STATE v. CAMERON, supra, one may unlawfully sell a controlled substance which he lawfully possesses. Furthermore, the sale of a substance is the passage of title thereto and while usually the seller of a controlled substance has possession thereof, actual or constructive, it is not necessarily so as a matter of law. One may sell an article or substance which he does not possess. Quite obviously, one may possess an article or substance which he does not sell. Consequently, possession is not an element of sale and sale is not an element of possession."

However, one may not possess a substance with intent to deliver without having possession thereof. Therefore, possession is an element of possession with intent to deliver and an unauthorized possession is a lesser included offense of possession with intent to deliver. STATE v. AIKEN, supra.

Applying the BLOCKBURGER test, it is clear that Petitioner was convicted of and sentenced for two separate offenses. Under North Carolina law conviction for possession with intent to sell in violation of N.C.G.S. 90-95(a)(1) requires proof of possession, while a conviction for sale in violation of G.S. 90-95(a)(1) does not require proof of possession. Similarly, under North Carolina law, a conviction for sale requires proof of a specific act not required to be proven for a conviction of possession with intent to sell. The *BLOCKBURGER* test is satisfied if each of the crimes requires proof that the other does not, even though the proof offered substantially overlaps. *IANNELLI* v. UNITED STATES, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

The case of BROWN v. OHIO, _____ U.S. _____, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) on which Petitioner so heavily relies, involves obviously distinguishable

circumstances. Nathaniel Brown was convicted of auto theft following a prior conviction of joyriding involving the same car. In affirming the auto theft conviction, the Ohio Court of Appeals specifically held that joyriding was a lesser included offense of auto theft and that the two prosecutions involved the same offense. The BROWN Court, in applying the BLOCKBURGER test, relied on this finding and concluded that the two offenses of which Brown was convicted "as defined by the court constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause." BROWN v. OHIO, Id. at 2226.

The two statutory offenses of which Petitioner was convicted as defined by the North Carolina Supreme Court, do not constitute the "same offense" for purposes of double jeopardy. The construction of a state statute by the highest court of a state is binding on the federal courts. ALBERTSON v. MILLAND, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 983 (1953); HUDDLESTON v. DWYER, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944).

The fact that other state courts or federal courts have examined different statutes and invalidated multiple convictions or punishments involving a single controlled substance transaction is not a sufficient reason to grant Petitioner's writ. "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the Court does not exceed its legislative authorization by imposing multiple punishments for the same offense." BROWN v. OHIO, supra at 2225.

2. THE ADMISSION OF TESTIMONY FROM A PROSECUTION WITNESS REGARDING HIS PRESENT RECOLLECTION REFRESHED OF THE DENOMINATIONS AND NUMBER OF BILLS ALLEGEDLY TRANSFERRED TO THE PETITIONER IN EXCHANGE FOR A QUANTITY OF HEROIN DID NOT VIOLATE

THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT ACCUSING WITNESSES AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

At Petitioner's trial, prosecution witness Agent Johnnie L. Price gave testimony regarding the number and denominations of bills allegedly used to purchase heroin from the Petitioner. In so testifying, Price was permitted to use a typewritten list to refresh his present recollection.

The use of notes to quicken the memory is well-recognized procedure in North Carolina, if the memorandum is one which has been made by the witness, or in his presence, or under his direction. STATE v. PEACOCK, 236 N.C. 137, 72 S.E.2d 612 (1952). If after reading the document, the witness is able to remember the events, he may give testimony about them. STATE v. COLLINS, 22 N.C. App. 590, 207 S.E.2d 278 (1974), *cert.* denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

On voir dire, Agent Price testified that the original handwritten lists of serial numbers were made by himself and four other officers in his presence and that these lists were then given by him to his secretary who typed the master list used at trial under his supervision. Agent Price testified that though he did not double check the serial numbers listed by the others, he did count the money after the serial numbers were taken, and the amounts of money matched the amounts written on each list. Agent Price further testified that he could use the list to refresh his recollection of the numbers and denominations of the bills making up the $6000.

Petitioner correctly points out that the Sixth Amendment right to confront accusing witnesses is applicable to the states through the Fourteenth Amendment. POINTER v. TEXAS, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). However, Petitioner's argument that the four officers who helped Agent Price compile the original lists were accusing witnesses whom he should

have been allowed to confront is without merit. No testimony whatsoever was presented regarding the serial numbers these officers wrote down. Agent Price testified only regarding the denominations and number of each denomination of the $6000, facts of which he clearly had independent personal knowledge after having counted the money himself. Petitioner's contention that the other officers were accusing witnesses is simply unsupported by the trial record.

Petitioner's contention that the destruction of the original lists violated his Fourteenth Amendment Due Process rights is similarly unsupported by the trial record as well as by the cases cited by Petitioner. In BRADY v. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court remanded for a new determination of punishment because the prosecutor had suppressed a confession of a co-conspirator at the trial of the defendant. In UNITED STATES v. AGURS, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court held that nondisclosure by the prosecutor of evidence of the victim's criminal record at the time of the defendant's trial did not violate the defendant's due process rights. The Court found that the omitted evidence would not have created a reasonable doubt of guilt that did not otherwise exist and therefore, no constitutional error had been committed.

In Petitioner's case, the record reveals no attempt to introduce evidence of the serial numbers on the list or to show that bills with these serial numbers (or any other bills) were found in the possession of Petitioner. Petitioner was tried for and found guilty of the possession of heroin with intent to sell and the sale of heroin, not for the possession of certain bills. Petitioner's guilt of the sale depended on whether or not he received money from Agent Price in exchange for heroin. Petitioner's guilt did not depend on whether he received a certain number of twenty or fifty dollar bills. While discrepancies between the amounts recorded on the original list and Agent Price's

testimony might have been used to show that Agent Price was somewhat careless in recording the numbers, such discrepancies would not have created any reasonable doubt about the veracity of Agent Price's testimony that he did, in fact, give money to the Petitioner. Thus, the original lists contained no material evidence determinative of Petitioner's guilt or innocence and their destruction cannot be viewed as a deprivation of Petitioner's constitutional rights.

CONCLUSION

From the arguments set forth above, it conclusively appears that Petitioner has raised no issue justifying further consideration of his case by this Court. The decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court were decided in accordance with the applicable decisions of this Court, and Petitioner has failed to show any legal wrong amounting to an infringement of his constitutional rights. Therefore, a writ of certiorari should not be issued in this case.

This day of November, 1977.

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